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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-800

AMERICAN MARITIME ASSOCIATION,
Petitioner,

v.

ELLIOT L. RICHARDSON, vice Peter G. Peterson, Secretary of Commerce, et al.,
Respondent.

REPLY OF PETITIONER TO BRIEF OF THE FEDERAL RESPONDENTS IN OPPOSITION

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February 5, 1976.

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Petitioner's basis for seeking certiorari is the importance of the questions presented to national policy governing defense and commerce by sea. The large sector of the merchant marine that petitioner represents has been a major factor in defense, and the military authorities have perceived the disappearance of one of its major components as a significant loss and detriment.

The brief in opposition of the Solicitor General denies that the misinterpretation of law alleged by petitioner has been responsible for this loss and detriment, but also argues the correctness of the decision below. Petitioner replies as follows.

1. The Solicitor reduces the case to a controversy in which different sectors of the industry seek a competitive advantage "at the expense of the other and of the national interest." At 6. The destruction of the unsubsidized fleet has not been a service to the national interest, but on the contrary endangers it. See testimony of Department of Defense, cited petition p. 9 n. 1. Petitioner's members seek no competitive advantage, but that in common fairness government subsidy shall not be employed against them when it was intended by Congress for competition against foreign carriers.

2. But the Solicitor denies that non-compensatory bidding by subsidized lines has been the cause of this injury to the unsubsidized companies (breakbulk and container) and to the national interest, citing a single sentence from the agency decision. Id. Contradicting this cavalier disposition stand the detailed findings of the Board's Chief Examiner, the agency's own practically contemporaneous statement before the Federal Maritime Commission, and the decision below.

a. Since the Solicitor goes to the merits, the Chief Examiner's findings should be stated. He found that subsidized carriers were generally underbidding unsubsidized breakbulk carriers, although "non-subsidized containership operators were able to compete fairly well ratewise." JA [in the record below] 69. "In late 1969-70 the impact of competitive, below fully-allocated cost bidding for military cargo by subsidized carriers caused non-subsidized conventional liner carriers to suffer financial hardship resulting in (a) cancellation of orders for modern ships and (b) sales of vessels to foreign interests for operation or scrapping, thus diminishing U.S.-flag fleet capability of carrying military cargo in case of national emergency." JA 71. "The existing system of paying operating differential subsidy to some, but not all, U.S. carriers in support of

competitive bids for military cargo at non-compensatory rates . . . 3. Supports unfair and destructive competitive practices against non-subsidized conventional U.S.-flag carriers . . .; and 4. Results in decreasing overall U.S. military shipping capacity by forcing non-subsidized carriers to transfer vessels for operation under foreign-flag." JA 89. "Formerly States Marine and Lykes were competitive in the Gulf-Far East and Gulf-Mediterranean preference trades, but more recently States Marine has dropped out because of underbidding by Lykes. In the fertilizer movement in India . . . the existence of a bidding advantage derived from subsidy, favoring AEIL, was conceded by AIMS . . . In 1969, . . . AML and States [subsidized] carried all the preference wheat to Korea by underbidding States Marine's $25.00 per ton rate with an $18.25 - 18.50 rate supported by operating subsidy . . . On rice . . . Lykes used its operating subsidy to slightly underbid States Marine for the U.S.-flag portion of the Government-impelled cargo rather than compete with foreign-flag carriers for the non-preference (over 50%) share". JA 98. "The recent decline in the movement of preference cargoes, the improved efficiency of the non-subsidized containership carriers, and the continued subsidy supported underbidding has had a serious adverse impact on the non-subsidized conventional carriers" [listing transfers and scrappings of 45 vessels in 1970 and the first four months of 1971]. JA 110. "The suggestion that most of the 145 non-subsidized vessels will be obsolete in 3-5 years is questionable given more equitable competitive conditions." JA 116. "The payment of operating-differential subsidy based on higher U.S.-flag costs to some but not all U.S.-flag carriers . . . results in unfair competition destructive of an important segment of the U.S. Merchant Marine". JA 120.

b. The Board's disposition of its Chief Examiner's exhaustive findings is in a single sentence, unsupported by

constitutive findings, and was immediately contradicted by its own testimony before the Federal Maritime Commission, petition p. 10 n. 2.

c. The Court of Appeals accepted the Chief Examiner's findings. Petition app. A-6 n. 4.

d. The Solicitor suggests that unsubsidized carriers are able to "compete effectively" with subsidized carriers because of alleged inflexibilities imposed upon the latter. At 7. No factual foundation is adduced for this assertion, and it is contrary to the record. The remaining allegations are either equally applicable to unsubsidized companies or merely equalize the competition between them by deliberate congressional intention.

3. The Solicitor agrees that the subsidized lines have "a statutory obligation to 'meet foreign-flag competition' ", which they may not "avoid by concentrating upon the carriage of non-competitive preference cargo." At 8. However, he defends the Board's rule, under which, owing to its exemption first of 50% of gross revenue and then of a major category of cargo that foreigners may not lawfully carry, subsidized lines may "concentrate upon the carriage of non-competitive preference cargo" to the extent of 95% without remitting a penny of subsidy.

a. The Solicitor defends the 50%-rule as "harmonizing" the statutory policies by "giving equal effect to the congressional requirement of competition and the congressional authorization to carry non-competitive preference cargoes." At 8. Of course, the Board gave no reason whatever for this exemption, and the Solicitor (whose independent rationalization, it is unnecessary to say, enjoys no authority) has not improved the legal position. It is not apparent how carrying 50% preference cargo "harmonizes" with a statute that forbids the award of subsidy except to meet foreign competition. §601 (a), MMA'36, as

amended, 46 U.S.C. §1171. The factual and analytical justification for allowing a 50% deviation is as little explained by the Solicitor as by the Board.

b. The Solicitor defends the exemption of cargoes moving at conference freight rates merely by quoting the Board's own scant and conclusory words, devoid of factual underpinning. At 9. But the correctness of the Board's exclusion turns on whether the joint fixing of rates by the subsidized lines and foreign lines constitutes competition, considering that the foreign lines are forbidden physically to carry the cargo. Does rate-fixing constitute competition?

4. With respect to the ruling on construction-differential subsidy, the Solicitor advances a different justification from the Court below for omitting to recapture in proportion to the carriage of non-competitive cargo. Cf. §506, MMA '36, 46 U.S.C. §1156. He says that "the major purpose of the construction-differential subsidy is to enable American lines to purchase American-built vessels at a price competitive with what would be charged by foreign shipyards for foreign-built ships." At 10. But is this not to enable them to compete with foreign carriers in the carriage of cargo? If they do not compete, they have no need for the subsidy, and no one would dream of paying it to them. See petition p. 20-21. What they carry cannot, therefore, be irrelevant, as the Solicitor suggests.

Respectfully submitted,

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